RENDERED: October 19, 1995
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY
95-SC-383-WC

LEECO, INC. APPELLANT

V. APPEAL FROM COURT OF APPEALS
NO. 94-CA-1977-WC
(Workers' Compensation Board No. 93-30380)

BILLY WAYNE BURNS;
LLOYD R. EDENS, Administrative
Law Judge; and
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal of a workers' compensation award is premised on the employer's assertion that KRS 342.732(1)(a), as applied to this claim, violates the 5th and 14th Amendments to the United States Constitution and Sections 2 and 59 of the Kentucky Constitution.

Claimant had worked as an underground coal miner since 1975 and continued to be so employed during the adjudication of this claim for benefits pursuant to KRS 342.732(1)(a), also known as the retraining incentive benefit or RIB statute. The contested issues included the existence of coal workers' pneumoconiosis, claimant's entitlement to a RIB, and the constitutionality of KRS 342.732(1)(a).

On March 30, 1994, claimant was awarded a RIB, and the employer appealed, contesting the constitutionality of KRS 342.732(1)(a).[1] The award was affirmed by the Workers' Compensation Board (Board) in an opinion that acknowledged the Board's lack of jurisdiction over the issue being appealed. Blue Diamond Coal Co. v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945) and Kenton and Campbell Benevolent Burial Assoc. v. Goodpaster, Ky., 200 S.W.2d 120 (1946).

The employer then appealed to the Court of Appeals, raising the constitutional issues and arguing that the 1994 amendment was remedial and should be applied to this case. The Court of Appeals disposed of the second argument by noting that the argument was not preserved and that the claim was not pending on the effective date of the amendment. In affirming the award, the Court of Appeals cited extensively from the rationale supporting the decision in Kentucky Harlan Coal Company v. Holmes, Ky., 872 S.W. 2d 446 (1994), in which KRS 342.732(1)(d) survived a similar constitutional challenge.

The employer now appeals to this Court, arguing that the Court of Appeals overlooked the implications of the fact that, unlike the other subsections of KRS 342.732, subsection (1)(a) is not premised on a finding of occupational disability. The employer also argues that the provision applies only to coal miners and that there is no distinctive or natural reason to support the classification created by the statute. Furthermore,

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[1]KRS 342.732(1)(a) was amended, effective April 4, 1994, to provide that, in the case of a working miner who was enrolled and actively participating in a bona-fide training or education program, benefits would be paid directly to the institution. The benefit could be paid directly to a worker only if the worker was no longer employed in the mining industry.

the employer argues that the pre-1994 provision does not protect the miners' health because it does not require them to leave the industry or to use the benefit for retraining. Therefore, the employer asserts that the pre-1994 version of the statute is so arbitrary and irrational that it violates the principles of due process and that the provision constitutes special legislation.

Contrary to the employer's assertion, we agree with the Court of Appeals that the rationale supporting the decision in Holmes, supra, also is applicable to subsection (1)(a) of KRS 342.732. Furthermore, we reject the assertion that the implications of awarding a RIB to a worker who has not demonstrated a respiratory impairment were overlooked by the Court of Appeals.

The legislature's purpose for enacting KRS 342.732 (1)(a) was to encourage coal workers who have contracted occupational pneumoconiosis but who have not as yet sustained a significant respiratory impairment to leave the industry before they become disabled. The means by which the legislature sought to accomplish that objective was by providing for a RIB. See Thornsbury v. Aero Energy (rendered September 21, 1995).

As explained in Holmes, supra, the classifications set forth in KRS 342.732 apply equally to all in the class and the legislature had distinct and natural reasons for separately classifying coal workers as well as for employing the subclassifications set forth within KRS 342.732, including that set forth in subsection (1)(a). Id., at 455. By providing a benefit which is aimed at encouraging coal workers who have contracted pneumoconiosis to leave the mining industry before they become disabled, the pre-1994 version of KRS 342.732 (1)(a), like the other subsections of the statute, is rationally related to the legitimate governmental objectives which were

recognized by the Court in Holmes, Id. The fact that under the pre-1994 version of the statute some workers chose not to use the benefit for its intended purpose does not render the legislature's decision to provide the benefit so unreasonable as to be arbitrary. Accordingly, we agree with the Court of Appeals that the pre-1994 version of KRS 342.732(1)(a) does not constitute special legislation nor does it violate the principles of either state or federal due process. U.S. Const., Amendments 5 and 14; Ky. Const. §2 and 59.

The decision of the Court of Appeals is hereby affirmed.

All concur.

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RENDERED: APRIL 14, 1995, 2:00 p.m. TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS
NO. 94-CA-001977-WC

LEECO, INC. APPELLANT

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-93-030380

BILLY WAYNE BURNS; LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: EMBERTON, MILLER AND SCHRODER, JUDGES.

SCHRODER, JUDGE: The issue in this petition for review of a decision of the Workers' Compensation Board is whether KRS 342.732(1)(a), as it existed prior to the April 4, 1994 legislative amendment, is constitutional.

We quickly dispose of appellant's belated argument that the amendment to KRS 342.732(1)(a) should be retroactively applied. This argument was not preserved for appeal. In addition, the claim was not pending as of April 4, 1994. See Thornsbury v. Aero Energy, Ky., _____ S.W.2d _____ (1995). As a result, appellant does not have standing to question the constitutionality of KRS 342.732(1)(a), as amended April 4, 1994.

Leeco, Inc. (Leeco) maintains that the retraining incentive benefits (RIB) statute, KRS 342.732(1)(a), is unconstitutional because it is special legislation and is violative of due process. We borrow generously from the Supreme Court's opinion in Kentucky Harlan Coal Company v. Holmes, Ky., 872 S.W.2d 446 (1994), which declared KRS 342.732(1)(d) constitutional, in finding the RIB statute constitutional.

Regarding the claim of special legislation, Leeco contends that the statute does not apply equally to all in a class, as only Kentucky coal miners may qualify to receive the benefits. Leeco further finds no distinctive or natural reason to support the classification because, if the miners who qualify for RIBs become impaired, they are entitled to relief under either KRS 342.732(1)(b), (c), or (d). Appellant claims there is no substantial or justifiable reason for the classification based on legislative history or the statute's title or subject matter. Leeco asserts that subsection (1)(a) does not protect the miners' health because it does not require them to leave coal mine employment and certainly does not require retraining.

For a law to be constitutionally general, and therefore not special legislation, it must meet these requirements:

(1) it must apply equally to all in a class, and

(2) there must be distinctive and natural reasons inducing and supporting the classification.

Holmes at 452.

Relative to the first prong of the test, Greene v.

Caldwell, 170 Ky. 571, 186 S.W.2d 648 (1916) established, and Holmes affirmed, that the Workers' Compensation Act, and as a corollary KRS 342.732, was not special legislation even though it applies only to certain employers and employees. Because the financial crisis faced by the Kentucky workers' compensation system, as described below, was caused by workers who contracted coal workers' pneumoconiosis, there was "no necessity to include workers with other occupational pneumoconioses in order to remedy the problems which the legislation sought to correct." Holmes at 453. Therefore, prong one of the test is met.

"[L]egislative classifications may be used to regulate employer/employee relations where the classification is consistent with correcting an abuse or problem which the legislature seeks to cure." Holmes at 452. The Court found distinctive and natural reasons for the classification, specifically, to put the Special Fund, which had borne a disproportionate burden of previous awards to miners, on sounder financial footing[2] and to "decrease the number of total, occupational disability awards for coal workers' pneumoconiosis." Id. at 454. These reasons apply equally well to subsection (1) (a) of the statute.

Retraining incentive benefits have been described by former Senator H. Edward O'Daniel, Jr. as "a political compromise." 1987 Kentucky Workers'Compensation Law, p.21. Whereas, prior to the enactment of KRS 342.732, black lung awards in Kentucky were largely an all or nothing proposition. Under the new law, there would be a large number of awards that granted less than total disability. Therefore, the RIB subsection was seen as a "compromise method of containing the runaway costs of the black lung

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[2] "Coal workers' pneumoconiosis accounted for 95% of the Special Fund's liability for occupational disease, and over 90% of awards for the disease were for total disability." Id. at 453.

program." Id. Awards under KRS 342.732(1)(a) are paid solely by employers; the Special Fund has no liability. Moreover, a miner who receives a RIB gets a 208-week award, not a lifetime total disability award. Accordingly, KRS 342.732(1)(a) is not special legislation.

The Holmes Court also rejected the notion that KRS 342.732(1)(d) violates due process. Because the statute involves the regulation of economic matters, it must be rationally related to a legitimate governmental objective to pass due process muster. "The constitutionality of a statute will be upheld if its classification is not arbitrary, or if it is founded upon any substantial distinction suggesting the necessity or propriety of such legislation." Holmes at 455. We believe the Supreme Court's holding in Holmes speaks not only to KRS 342.732(1)(d), but also to (1)(a) and the other two subsections:

> Decidedly, KRS 342.732 and the classifications created therein are rationally related to a legitimate state objective, affording protection to all of Kentucky industry, (and hence, the employment/jobs of Kentucky workers) from an economic drain caused by Special Fund assessments for compensation claims directly related to the coal industry, and particularly those due to high incidence of coal workers' pneumoconiosis. As the problem the legislature sought to solve was attributable to the coal industry, the solution therefor need deal only with workers of that industry. Said otherwise, the classification of coal workers with pneumoconiosis was founded on a substantial distinction that was necessary in view of the legislative history.

Id.

KRS 342.732, including subsection (1)(a), furthers the goals of lessening the economic drain on the Special Fund caused by claims due to coal mine employment, reducing workers' compensation payments, and providing an alternative to total disability. The purpose of KRS 342.732 (1) (a), specifically, is to retrain workers for other jobs so as to diminish the likelihood of their becoming totally disabled by coal miners' pneumoconiosis later on. We need not address the efficiency with which the RIB statute accomplished these goals. For the foregoing reasons, we find that KRS 342.732(1)(a) is constitutional, and the Workers' Compensation Board's opinion is affirmed.

ALL CONCUR.

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COMMONWEALTH OF KENTUCKY

WORKERS' COMPENSATION BOARD

OPINION RENDERED: July 29, 1994

CLAIM NO. 93-30380

LEECO, INC. PETITIONER

VS. APPEAL FROM HON LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE

BILLY WAYNE BURNS and
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

AFFIRMING

* * * * * *

BEFORE: ANGELUCCI, Chairman, and GREATHOUSE, Board Member

GREATHOUSE, MEMBER. Leeco, Inc. ("Leeco") appeals from an Opinion, Order and Award rendered March 30, 1994 by Hon. Lloyd R. Edens, administrative Law Judge ("ALJ"), wherein Billy Wayne Burns ("Burns") was awarded retraining incentive benefits pursuant to KRS 342.732 (1) (a). Leeco's only appellate argument is that KRS 342.732 (1) (a) is unconstitutionally arbitrary and irrational. We decline to address the merits of Leeco's argument. As an administrative agency, this Board has no jurisdiction to determine the constitutionality of a statute. Blue Diamond Coal Co. v.

Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Such a determination can only be made by a court of law. Kenton and Campbell Benevolent Burial Assoc. v. Goodpastor, Ky., 200 S.W.2d 120 (1946).

Accordingly, the Opinion, Order and Award rendered March 30, 1994 by Hon. Lloyd R. Edens, Administrative Law Judge, is hereby AFFIRMED, and the appeal by Leeco, Inc. is hereby DISMISSED.

ALL CONCUR.

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ADMINISTRATIVE LAW JUDGE:

Hon. Lloyd R. Edens
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COMMONWEALTH OF KENTUCKY

DEPARTMENT OF WORKERS' CLAIMS
CLAIM NO. 93-24528

BILLY WAYNE BURNS, PLAINTIFF,

vs. OPINION, ORDER AND AWARD

LEECO COAL COMPANY, DEFENDANT.

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FINDINGS OF FACT

1. At the pre-hearing conference on March 18, 1994, the parties stipulated the following matters: coverage under the Act; employment relationship between the plaintiff and defendant at all relevant times; due and timely notice; average weekly wage which entitled the plaintiff to maximum

benefit; the plaintiff is still working for the defendant-employer; the plaintiff had 18 years of multiple exposure; and the plaintiff's date of birth was May 27, 1947.

The contested issues in the case were the existence of pneumoconiosis and whether the plaintiff was entitled to Retraining Incentive Benefits (RIB). Additionally, the defendant-employer reserved the constitutionality of KRS 342.732 as an issue. The case was submitted on the record as of March 30, 1994, and the parties waived the right to a hearing.

2. The plaintiff, Billy Wayne Burns, testified by deposition on November 3, 1993, that he had worked as an underground coal miner since 1975. He stated that his duties included working as a general mine foreman and on the belt line.

3. The medical evidence in the case consisted of the following:

(a) Dr. Emery Lane, a pulmonary specialist, interpreted a May 19, 1993, chest x-ray of the plaintiff as evidencing Category l/1 coal workers' pneumoconiosis.

(b) Dr. Glen Baker, a pulmonary specialist, interpreted a May 19, 1993, chest x-ray of the plaintiff as evidencing Category 1/0 coal workers' pneumoconiosis.

(c) Dr. Judah Skolnick, a pulmonary specialist, interpreted a May l9, 1993, chest x-ray of the plaintiff as evidencing Category 1/2 coal workers' pneumoconiosis.

(d) Dr. William Anderson, a pulmonary specialist, interpreted a May 19, 1993, chest x-ray of the plaintiff as

showing no evidence of coal workers' pneumoconiosis.

(e) Dr. Ballard Wright interpreted a July 23, 1993, chest x-ray of the plaintiff as showing no evidence of pneumoconiosis.

(f) Dr. Bruce Broudy, a pulmonary specialist, interpreted an October 6, 1993, chest x-ray of the plaintiff as showing no evidence of pneumoconiosis.

4. In reviewing the medical evidence in this case, I am persuaded by the findings of Drs. Lane and Skolnick, both noted pulmonary specialists, who diagnosed Category 1/1 and 1/2 pneumoconiosis, respectively. Accordingly, based upon the plaintiff's work history, exposure,. and the aforementioned medical findings, it is my finding that the plaintiff, Billy Wayne Burns, has Category I coal workers' pneumoconiosis and is entitled to the Retraining Incentive Benefit pursuant to KRS 342.732(1)(a).

RULINGS OF LAW

KRS 342.020
KRS 342.316
KRS 342.732
KRS 342.800

AWARD AND ORDER

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The plaintiff, Billy Wayne Burns, shall recover of the defendant-employer, Leeco Coal Company, and/or its insurance carrier, the sum of $147.90 per week, beginning the second regular pay period after this award becomes final, and

continuing thereafter for 208 weeks, with interest at the rate of 12% per annum on all due and unpaid installments of such compensation, and the said defendant shall take credit for payments of such compensation heretofore paid.

2. The plaintiff, Billy wayne Burns, shall further recover of the defendant-employer, Leeco Coal Company, and/or its insurance carrier, for the cure and relief of the occupational disease, such medical, surgical and hospital expenses, including nursing, medical and surgical supplies and appliances, as may reasonably be required for the treatment of his occupational disease.

3. Appropriate credit shall be given in the event of an award to the plaintiff under the Federal Coal Mine Safety and Health Act for any payments made in excess of the benefits provided for in accordance with KRS 342.800.

4. All Motions for approval of attorney fees shall be filed with the Department of Workers' Claims within thirty (30) days following the final disposition of this award.

SO ORDERED, this 30 day of March, 1994.

Lloyd R. Edens
Administrative Law Judge